88-512

No.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1988

THE STATE OF MICHIGAN
Petitioner

v.

TYRIS LEMONT HARVEY
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

John D. O'Hair
Prosecuting Attorney
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28 pp

STATEMENT OF THE QUESTION PRESENTED

I

MAY A DEFENDANT BE IMPEACHED WITH A STATEMENT TAKEN IN VIOLATION OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL UNDER MICHIGAN V JACKSON?

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NOW COMES the State of Michigan, by John D. O'Hair, Prosecuting Attorney for the County of Wayne, and Timothy A. Baughman, Chief of the Criminal Division, Research, Training and Appeals, and prays that a writ of certiorari issue to review the judgment of the Michigan Court of Appealst entered in the above cause on May 18, 1988, leave denied by the Michigan Supreme Court on August 24, 1988 with three justices dissenting.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is appended as Appendix A. The order of the Michigan Supreme Court denying leave to appeal is appended as Appendix B.

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on May 18, 1988. The order of the Michigan Supreme Court was entered on August 24, 1988. The jurisdiction of this Court is invoked under 28 USC 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides, in pertinent part, that in all criminal prosecutions the accused shall have the

right to "the assistance of counsel in his defense."

The Fourteenth Amendment provides, in pertinent part, that no person shall be deprived of liberty without "due process of law."

STATEMENT OF THE CASE

The pertinent facts are well-stated in the opinion of the Michigan Court of Appeals:

"Following a bench trial, defendant was convicted of two counts of first degree criminal sexual conduct (CSC), MCL 750.520b(1)(e); MSA 28.788(2)(1)(e). Defendant was sentenced to six to ten years imprisonment for each CSC; the sentences ran concurrently. Defendant appeals as of right. We reverse.

Only the victim and defendant testified at trial. While the victim testified that defendant beat and raped her, defendant testified that the victim agreed to perform sexual favors in exchange for cocaine. Defendant conceded that he hit the victim, but claimed that

it was only after she had threatened him and struck him.

After defendant was arrested, he made a statement to the police at 8:50 a.m. on July 2, 1986, apparently before he was arraigned. The statement was recorded by a police officer and does not indicate whether defendant was advised of or waived his Miranda v [Arizona, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966)] rights. While defendant signed the first page of the three-page statement, he refused to sign the last two pages because the officer "wrote some stuff [he] didn't like ... something that wasn't pertaining to what happened." Defendant then asked for an attorney.

Defendant was arraigned on July 2, 1986, and counsel was appointed. On September 9, 1986, six days before trial,

defendant told another police officer that he wanted to make another statement, but he didn't know if he should talk to his lawyer. The officer told him that he didn't need to talk to his lawyer because his lawyer was going to get a copy of the statement anyway. Defendant then signed a constitutional rights waiver form. Defendant initialed the following rights: (1) I have the right to remain silent and I do not have to answer any questions put to me or make any statements; (2) I have the right to have an attorney (lawyer) present before and during the time I answer any questions or make any statements; and (3) if I cannot afford an attorney (lawyer), one will be appointed for me without cost by the court prior to any questioning. Defendant did not initial the following rights: (1) any statement I make or anything I say will be used against me in a Court of Law and

(2) I can decide at any time to exercise my rights and not answer any questions or make any statement. When asked if he understood his constitutional rights, defendant responded: "Yes." Defendant then gave a detailed statement different from his first statement, but essentially similar to his trial testimony.

At trial, the prosecutor did not use the statements in her case in chief. When defendant testified, the prosecutor used the statements made on the first page of the first statement to impeach defendant. Defendant was impeached without objection. When the prosecutor attempted to impeach defendant with the second statement, defense counsel objected. The prosecutor conceded that the second statement could not be used in her case in chief because it was taken in violation of defendant's Miranda rights;

however, she argued that she could use it for impeachment purposes because it did not appear to be involuntary, citing Harris v New York, 401 US 222; 91 S Ct 643; 28 L Ed 1 (1971). Defense counsel had no objection to the prosecutor using the second statement for impeachment purposes; however, he apparently believed that the second statement was identical to defendant's trial testimony and, therefore, could not be used to impeach defendant. The prosecutor used the statement to impeach defendant by pointing out that defendant had failed to include some of his trial testimony in the second statement even though it was only given six days earlier."

The Court of Appeals reversed on the ground that Respondent was impeached with a confession taken in violation of Michigan v Jackson, 475 US 625, 106 S Ct

1404, 89 L Ed 2d 631 (1986). The court stated that "this statement was also made in violation of defendant's Sixth Amendment right to counsel....A statement so acquired may not be used for any purpose, including impeachment. See Meadows v Kuhlman, 812 F 2d 72 (CA 2, 1987), cert den ___US___; 107 S Ct 3188; 93 L Ed 2d 676 (1987); United States v Brown, 699 F 2d 585 (CA 2, 1983)." The court also noted that "Michigan law is consistent. People v Gonyea, 421 Mich 462 (1984)" (slip op at 3).

The People applied for leave to appeal to the Michigan Supreme Court, observing that the ground of decision in Gonyea was not settled, and was on federal grounds. Three justices there found a violation of the Michigan Constitution, three justices found that the state law basis was a "pretext for evading review by the United States Supreme Court" and disagreed on

the merits, and one justice found a Sixth Amendment violation, and that "Under these facts, I concur with my brother Williams' conclusion that the statement in question is inadmissible for any purpose." 426 Mich at 482-483 (emphasis added). (Petitioner would note that the decision here was based solely on the Sixth Amendment, and that in Gonyea, then, only three of seven justices viewed the matter under the state constitution, with three viewing the state law consideration as a pretext to attempt to evade review by this court). Leave was denied on August 24, 1988, with three justices dissenting.

REASONS FOR GRANTING THE WRIT

Petitioner would first dispell any possible claim that the decision below rests on state grounds. The Michigan Court of Appeals expressly held that "this statement was also made in violation of defendant's Sixth Amendment right to counsel. See e.g., Michigan v Jackson, 475 US 625; 106 S Ct 1404; 89 L Ed 2d 631 (1986), affirming 421 Mich 39 (1984). A statement so acquired may not be used for any purpose, including impeachment. See Meadows v Kuhlman, 812 F2d 72 (CA 2, 1987), cert den ___US___; 107 S Ct 3188; 93 L Ed 2d 676 (1987); United States v Brown, 699 F 2d 585 (CA 2, 1983)." Thus, the Court of Appeals cited two federal cases which turn on the Sixth Amendment. The Court of Appeals also stated that "Michigan law is consistent. People v Gonyea, 421 Mich

462; 365 NW2d 136 (1984)." Gonyea was a 3-1-3 decision. Three justices found that impeachment with a confession taken in violation of the right to counsel violated the State Constitution; three justices found the state law basis of this holding to be a "pretext for evading review by the United States Supreme Court" and disagreed on the merits, and one justice found a Sixth Amendment violation, and that "Under these facts, I concur with my brother Williams' conclusion that the statement in question is inadmissible for any purpose." 426 Mich at 482-483 (emphasis added). Thus, a majority of the Court addressed the question under the Sixth Amendment, disagreeing on the application of the Sixth Amendment to the facts.

Petitioner submits that the issue presented is an unsettled one of significance to the jurisprudence to the

nation. In People v Gonyea, 421 Mich 462; 365 NW2d 136 (1984) the dissenting justices found that the federal courts appear split on the question of impeachment with statements obtained in violation of the Sixth Amendment right to counsel, see opinion of the Court of Appeals, and Gonyea, dissenting opinion of Justice Ryan, 421 Mich at 491. Moreover in dissenting from the denial of certiorari in Lucas v New York, 474 US 911 (1985) Justice White observed that:

> The issue presented in this case is whether the prohibition established in New Jersey v Portash, 440 US 450; 59 L Ed 2d 501; 99 S Ct 1292 (1979), against using a statement obtained from a criminal defendant in violation of his Fifth Amendment right against self-incrimination for impeachment purposes applies equally to statements taken in violation of the Sixth Amendment right to counsel. The United States Court of Appeals for the Second Circuit in United States v Brown, 699 F2d 585 (1983), and the Tenth circuit in United States v McManaman, 606 F 2d 919 (1979) (pre-Portash), have answered this question in the affirmative. The Appellate Division of the Supreme Court of New York in

> the present case, 105 App Div 2d 545, 481 NYS2d 789 (1984), and the New York Court of Appeals in New York v Ricco, 56 NY2d, 437 NE2d 1097 (1982), however, have given the opposite answer. I would grant certiorari to resolve this conflict.

Petitioner would also note that Meadows v Kuhlmann, 812 F2d 72 (CA 2, 1987), cited by the Michigan Court of Appeals, disagreed on this point with People v Meadows, 477 NE2d 1097 (1985), which had relied on New York v Ricco, 437 NE2d 1097 (1982), cited in Justice White's dissent from the denial of certiorari in Lucas v New York. Certiorari was denied in Meadows v Kuhlmann, but in that case the Second Circuit had gone on to find the error harmless.

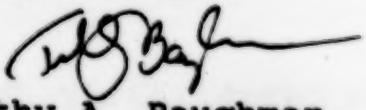
Petitioner submits that this Court should grant plenary review and resolve this important question.

CONCLUSION

WHEREFORE, for the reasons above stated, Petitioner submits that plenary review should be granted.

Respectfully submitted,

John D. O'Hair
Prosecuting Attorney
County of Wayne



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APPENDIX A

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

v **NO. 96420**

TYRIS LEMONT HARVEY **5/18/88**
Defendant-Appellant.

Before: H. Hood, P.J., and J.H. Gillis and M.B. Breighner,* JJ.

PER CURIUM

Following a bench trial, defendant was convicted of two counts of first degree criminal sexual conduct (CSC), MCL 750.520b(1)(e); MSA 28.788(2)(1)(e). Defendant was sentenced to six to ten years imprisonment for each CSC; the sentences ran concurrently. Defendant appeals as of right. We reverse.

Only the victim and defendant

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*Retired circuit judge, sitting on the Court of Appeals by assignment.

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Defendant was arraigned on July 2, 1986, and counsel was appointed. On September 9, 1986, six days before trial, defendant told another police officer that he wanted to make another statement, but he didn't know if he should talk to his lawyer. The officer told him that he didn't need to talk to his lawyer because his lawyer was going to get a copy of the statement anyway. Defendant then signed a constitutional rights waiver form. Defendant initialed the following rights: (1) I have the right to remain silent and I do not have to answer any questions put to me or make any statements; (2) I have the right to have an attorney (lawyer) present before and during the time I answer any questions or make any statements; and (3) if I cannot afford an attorney (lawyer), one will be appointed for me without cost by the court prior to

any questioning. Defendant did not initial the following rights: (1) any statement I make or anything I say will be used against me in a Court of Law and (2) I can decide at any time to exercise my rights and not answer any questions or make any statement. When asked if he understood his constitutional rights, defendant responded: "Yes." Defendant then gave a detailed statement different from his first statement, but essentially similar to his trial testimony.

At trial, the prosecutor did not use the statements in her case in chief. When defendant testified, the prosecutor used the statements made on the first page of the first statement to impeach defendant. Defendant was impeached without objection. When the prosecutor attempted to impeach defendant with the second statement, defense counsel objected. The prosecutor conceded that

the second statement could not be used in her case in chief because it was taken in violation of defendant's Miranda rights; however, she argued that she could use it for impeachment purposes because it did not appear to be involuntary, citing Harris v New York, 401 US 222; 91 S Ct 643; 28 L Ed 1 (1971). Defense counsel had no objection to the prosecutor using the second statement for impeachment purposes; however, he apparently believed that the second statement was identical to defendant's trial testimony and, therefore, could not be used to impeach defendant. The prosecutor used the statement to impeach defendant by pointing out that defendant had failed to include some of his trial testimony in the second statement even though it was only given six days earlier.

Defendant claims that the first page of the first statement could not be used

to impeach him because it was taken in violation of his Fifth and Fourteenth Amendment rights. We disagree because we do not believe defendant's first statement was involuntary. New Jersey v Portash, 440 US 450; 99 S Ct 1292; 59 L Ed 2d 501 (1979); Mincey v Arizona, 437 US 385; 98 S Ct 2408; 57 L Ed 2d 290 (1978); Oregon v Hass, 420 US 714; 95 S Ct 1215; 43 L Ed 2d 570 (1975); Harris, supra. We agree with the Michigan cases holding similarly. See, e.g., People v Esters, 417 Mich 34; 331 NW2d 211 (1982); People v Paintman, 139 Mich App 161; 361 NW2d 755 (1984), lv den 422 Mich 931 (1985).

If defendant's second statement was made only in violation of his Fifth Amendment Miranda rights, we would hold likewise; however, this statement was also made in violation of defendant's Sixth Amendment right to counsel. See

e.g., Michigan v Jackson, 475 US 625; 106 S Ct 1404; 89 L Ed 2d 631 (1986), affirming 421 Mich 39 (1984). A statement so acquired may not be used for any purpose, including impeachment. See Meadows v Kuhlman, 812 F2d 72 (CA 2, 1987), cert den ___US___; 107 S Ct 3188; 93 L Ed 2d 676 (1987); United States v Brown, 699 F 2d 585 (CA 2, 1983). Again, Michigan law is consistent. People v Gonyea, 421 Mich 462; 365 NW2d 136 (1984). However, the admission of such testimony may be harmless. Meadows, supra; Brown, supra. Because this case involved a credibility contest between defendant and the victim, we cannot say that the error was harmless beyond a reasonable doubt. See, e.g., People v Gee, 406 Mich 279; 278 NW2d 304 (1970).

Reversed.

/s/Harold Hood
/s/John H. Gillis
/s/Martin B. Breighner

APPENDIX B
MICHIGAN SUPREME COURT

ORDER
Entered: August 24, 1988

83447

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v **SC:83447**
COA:96420
LC:86-04667

TYRIS LEMONT HARVEY
Defendant-Appellee.

On order of the Court, the application for leave to appeal is considered, and it is denied, because we are not persuaded that the question presented should be reviewed by this Court.

Riley, C.J., Brickley and Boyle, JJ, would grant leave to appeal.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of

the order entered at the direction of the court.

August 24, 1988 /s/Corbin R Davis